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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 32

THE JOHN K. AND CATHERINE S. MULLEN BENEVOLENT CORPORATION, petitioner

v.

THE UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court overruling a demurrer to the complaint is reported in 40 F. (2d) 937. Its opinion on the merits (R. 124–128) is not reported. The opinion of the Circuit Court of Appeals (R. 135–162) is reported in 63 F. (2d) 48.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 23, 1933. (R. 162–163.) A petition for rehearing was denied March 21, 1933.

(R. 163.) The petition for certiorari was filed April 24, 1933, and was granted May 29, 1933, 289 U.S. 721. (R. 165.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner is the owner of certain bonds issued by an Idaho municipal corporation to pay the cost of sidewalk and sewerage improvements, which bonds by their terms; and by provisions of Idaho statutes are payable from a fund created by assessments against the land or lots benefited. Assessments calculated to pay in full the entire issue of the bonds and interest were duly levied against the properties subject thereto. Thereafter the United States acquired by purchase or condemnation, for a reclamation project, all the lands so assessed, and paid in full the assessments against them. These assessments proving inadequate, by reason of miscalculation and unforeseen contingencies, to pay in full the amounts due on the bonds, an attempted reassessment was made after the United States had acquired title to the lands to cover the unpaid amounts. The questions are:

1. Whether the District Court has jurisdiction under the Tucker Act of a suit against the United States for the amounts due on petitioner's bonds.

2. Whether the cause of action, if any, is barred by the six-year limitation of the Tucker Act.

3. Whether the right of action, if any, accrued to the petitioner.

STATUTES INVOLVED

The applicable provisions of the Idaho statutes are set forth in the Appendix, *infra*, pp. 20–32.

STATEMENT

The suit was filed in the District Court for the District of Idaho under the Tucker Act to recover amounts due on certain bonds held by the petitioner, a Colorado corporation, and issued by the Village of American Falls, Idaho, for the improvement of lots afterward acquired by the United States in connection with the construction of the American Falls Reservoir, under authority of the Reclamation Act of June 17, 1902, c. 1093, 32 Stat. 388.

The District Court awarded judgment for the petitioner in an amount of $8,104.79 with costs. (R. 46.) This judgment was reversed by the Circuit Court of Appeals for the Ninth Circuit, with instructions to dismiss the petition for lack of jurisdiction. (R. 162–163.)

The District Court made findings of fact (R. 34–45) which may be summarized as follows:

The Village of American Falls, by appropriate resolutions and proceedings, created in 1915 Local Sewerage Improvement District No. 1 for the construction of sewers, and in 1916, Local Sewerage Improvement Districts Nos. 2 and 8, for the con-

struction of sewers and sidewalks, respectively, authorized the issue and sale of bonds to finance the work and levied assessments against the lots in these districts, calculated to pay in full the principal and interest of the bonds. (R. 35–36, 36–38, 38–40.) There is no question as to the regularity of these proceedings or the validity of these assessments, which are hereafter referred to as the original assessments.

District No. 1 issued 24 bonds, numbered from 1 to 24, inclusive, of $1,000.00 each, with interest at 7%, dated July 15, 1915, and payable on or before July 15, 1925 (R. 36); District No. 2 issued 15 bonds, numbered consecutively from 1 to 15, inclusive, the first 14 of which were in the amount of $500.00 each, and the fifteenth, in the amount of $150.00, with interest at 7%, dated August 1, 1916, and payable on or before August 1, 1926 (R. 37–38); District No. 8 issued 43 bonds numbered consecutively from 1 to 43, inclusive, in the amount of $500.00 each, with interest at 7%, dated September 14, 1916, and payable on or before September 1, 1926 (R. 39). The entire issues of the bonds of the three districts were purchased upon their issuance by one J. K. Mullen, who in 1925, gave and transferred to the petitioner, their present holder, the last four bonds of District No. 1, upon which there is due the principal sum of $4,000.00, with interest from April 28, 1927; the last four bonds of District No. 2, upon which there is due the amount of $1,351.11, with interest from October 25, 1929;

the last 6 bonds of District No. 8, upon which there is due the amount of $3,000.00, with interest from March 18, 1928. (R. 36, 38, 40.) All of these bonds were in identical form, and contained the following warranty, which differed in wording in the respective bonds of the three districts only in the name of the district (R. 8–9, 36, 38, 40):

> AND IT IS HEREBY CERTIFIED, RECITED AND WARRANTED, That said village is now and for some years past has been a village of said state, and body politic and corporate, duly organized, existing and operating under and by virtue of the constitution and laws of the State of Idaho and the ordinances of said village to exist and to happen and be done and performed precedent to and in the creation of the said Local Sewerage Improvement District No. 1 and the construction of a sewerage system and sewerage disposal works therein and therefor, and the issuance of this bond in order to constitute the said bond the valid and binding obligation of said village, and payable as aforesaid, do exist and have happened and been done and performed in regular and due form and time; that the total costs and expenses of said improvements have been duly levied and assessed as special assessments for sewerage improvements upon all of the lands, lots, and pieces and parcels of land in said Local Sewerage Improvement District No. 1, separately and in addition to all other taxes, and said special assessments are a lien upon

said lands, lots, and pieces and parcels of land, and take precedence of all other liens; that due provision has been made for the collection of said special assessments and for the levy and collection of a direct annual tax, sufficient to pay the interest accruing hereon promptly when and as the same falls due and also to discharge the principal hereof at maturity.

In conformity with Subdivision 15, Chapter 80 of said Session Laws of 1911, it is hereby recited that "the holder of any bond issued under the authority of this chapter shall have no claim therefor against the city, town or village by which the same is issued, in any event, except for the collection of the special assessment made for the work of improvement for which said bond was issued, but this remedy, in case of nonpayment, shall be confined to the enforcement of said assessment. A copy of this subdivision shall be plainly written, printed, or engraved upon the face of each bond so issued".

During the period from 1920 to January 1, 1927, the United States acquired all the property within the three districts for the construction of a reservoir, some by condemnation proceedings to which the petitioner or its predecessor in interest was not made a party, but most of it by deeds from the record owners, who were permitted to retain possession until January 1, 1927, at which time, or shortly thereafter, the land was flooded. (R. 44–45.)

At the time of acquiring the property the United States paid or caused to be paid the original assess-

ments against it. (R. 43.) The original assessments, calculated when made to pay in full the principal amounts and interest of the bonds, proved insufficient to do so, according to the court's finding, "through mistake or inadvertence" (R. 36, 37, 39), and by ordinances enacted on July 3, 1928, followed by the prescribed statutory procedure, the City (formerly Village) of American Falls reassessed the property in the three districts for the deficiency. (R. 40–41.) These reassessments, however, according to the Findings, could afford petitioner no relief, and were made by the City in compliance with statutory mandate and for its own protection. (R. 41.)

The court further found that at the time the United States acquired the tracts of land within the three improvement districts, it was aware that the assessments originally made were insufficient to pay the bonds and interest and that it withheld until the institution of this suit a portion of the agreed purchase price for the purpose of protecting itself against the claim of the petitioner, which sum so withheld approximated $14,000 (Finding 20, R. 42–43).[1]

[1] The evidence in the "Bill of Exceptions" (R. 47–91) shows that this money was paid to the landowners before this suit was instituted and that the money was not withheld for payment to the bondholders. (See R. 74–75, 77, 83–84.)

The court found that the amount due on the bonds at the time of filing suit was $9,547.33 (R. 43), against which a credit of $1,442.54 was allowed, representing the amount of collections lost by reason of the failure of the bank, and awarded judgment for $8,104.79 (R. 46). This judgment was reversed by the Circuit Court of Appeals, as previously stated.

SUMMARY OF ARGUMENT

I

The jurisdiction of the District Court in cases of the instant nature derives from that provision of the Tucker Act, conferring jurisdiction, concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon "any contract, express or implied, with the Government of the United States." *United States* v. *Lynah*, 188 U.S. 445; *United States* v. *Cress*, 243 U.S. 316; *United States* v. *North American Transportation and Trading Co.*, 253 U.S. 330. Unless a contract may be implied upon the part of the United States to pay petitioner's claim there is no jurisdiction. Such contract cannot be implied here because (a) the United States did not take any property or right of petitioner, and (b) if it did take any such property or right, it was done in denial of petitioner's rights, and under circumstances negativing an intent to pay.

The United States did not take petitioner's bonds, or assert for its benefit any rights conferred by them. Nor did it take any lien or right created by the bonds in petitioner's favor against the lands. The only lien against the land was that created by by the original assessment, and this was paid in full. The bonds did not constitute a lien against the land. Under the statutes of Idaho, the only lien was that created by the assessment, and the bondholders' rights were dependant upon, and limited by, the assessment. The attempted re-assessment of July 3, 1928, made long after the United States had acquired title to the lands, could create no right or lien against the United States: *United States* v. *City of Buffalo*, 54 F. (2d) 474, certiorari denied, 285 U.S. 550. The fact that petitioner may have been deprived of the remedy of re-assessment under the Idaho statutes because of the acquisition of the land by the United States did not amount to an appropriation of any rights of petitioner. This was merely an incidental frustration from which no implied obligation on the part of the United States can arise, *Omnia Commercial Co.* v. *United States*, 261 U.S. 502; *Sanguinetti* v. *United States*, 264 U.S. 146.

II

In order to confer jurisdiction the contract must be one not merely implied in law but one which is implied in fact, founded upon a meeting of minds,

inferred as a fact from the conduct of the parties. *Baltimore & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597; *Alabama v. United States*, 282 U.S. 502; *United States v. Minnesota Investment Co.*, 271 U.S. 212. Such a contract cannot be inferred here. The United States having paid to the owners the full value of the land, and having discharged the liens against it, can hardly be held by implication to have agreed to pay some additional amount to the bondholders. There is no jurisdiction under the Tucker Act in such circumstances. *Alabama v. United States*, 282 U.S. 502; *Ball Engineering Co. v. White*, 250 U.S. 46; *Tempel v. United States*, 248 U.S. 121; *Hill v. United States*, 149 U.S. 593.

III

The six year limitation of the Tucker Act began to run, as to each lot, when the United States acquired title to it. The record does not show the dates of the various purchases, further than that the lands were acquired during the period from 1920 to January 1, 1927. Petition was filed November 25, 1929. The cause of action as to some of the lots at least is barred. The limitation is jurisdictional, and since the record fails to show as to any particular lot that the cause of action arose within the six-year period, petitioner has failed to meet the requirement that the record must affirmatively establish the existence of the necessary jurisdictional facts.

IV

The right of action, if any, accrued to the holder of the bonds at the time the United States acquired the lands. Petitioner did not become the owner of the bonds until 1925, while the lands were purchased during the period from 1920 to January 1, 1927. As to the lands purchased before petitioner became the holder of the bonds the right of action, if any, accrued to the holder of the bonds at that time, and petitioner has no right to sue. A cause of action against the United State cannot be assigned. (R.S. 3477.)

ARGUMENT

The suit is based on the theory that the United States "took" petitioner's bonds, or rights claimed under them. Such suits, if maintainable, are founded upon an implied contract to pay for the property taken, and the jurisdiction of the court to entertain them derives from that provision of the Tucker Act conferring jurisdiction on the District Courts, concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded "upon any contract, express or implied, with the Government of the United States." *United States* v. *Lynah*, 188 U.S. 445; *United States* v. *Cress*, 243 U.S. 316; *United States* v. *North American Transportation & Trading Company*, 253 U.S. 330. Without a contract there is no jurisdiction, and to give rise to an implied contract

there must be a direct and intentional taking of plaintiff's property, with authority to take and under circumstances from which an intent to pay may be inferred. No contract can be implied in the case at bar because (a) the United States did not take any property or right of petitioner, and (b) if there was a taking it was done in denial of petitioner's claim, and under circumstances negativing an intent to pay.

I

THE UNITED STATES DID NOT TAKE ANY PROPERTY OR RIGHT OF PETITIONER

It is obvious that the United States did not take petitioner's bonds or assert for its use any rights conferred by them. It took or acquired only land, and unless petitioner's bonds created in its favor some right or lien in the land which was taken by the United States by the acquisition of the land, there was no taking of any property of petitioner.

The original assessments, levied to pay the bonds and in effect at the time the United States acquired the land, were paid in full. Did the bonds constitute a lien against the lands in petitioner's favor, independent of and beyond these assessments? The answer must be in the negative. The bonds could not have such effect, unless specifically so provided in the statutes authorizing their issue. *Heine* v. *Commissioners,* 19 Wall. 655, 659; *Lyon* v. *Alley,* 130 U.S. 177, 189. The statutes of Idaho do not so provide; on the contrary, they specifically

provide that the lien is established and limited by the assessment. The Idaho Code provides (pp. 20, 21, *infra*) for the creation of improvement districts, requires that each lot or parcel of land be separately assessed for the full debt thereof in proportion to benefits derived. (Secs. 49-2702, 49-2707.) The assessment when levied shall become a lien upon the land. (Sec. 49-2709.) The Code provides for filing objections to such assessment, authoirzes appeal to the District Court, which shall have power to "confirm, modify or annul the assessment" (Secs. 49-2710, 2711, 2712, 2713, 2714); and the owner of any piece of property may redeem his property from liability by paying the assessment against it (Sec. 49-2721). Each bond shall provide that the principal sum and interest is payable out of the local improvement fund created for the payment of such improvement by such assessments, and not otherwise (Sec. 49-2720). The bondholders' remedy in case of default is to sue for and collect the assessment embraced in any such bond (Sec. 49-2725) and "the holder of any such bond shall look only to the fund provided by such assessment for the principal or interest of such bond" (Sec. 49-2727). These provisions limit the bondholders' right as to each parcel of land to the enforcement of the assessment against it, and without such assessments, there is no right or remedy. *New First National Bank* v. *Weiser,* 30 Idaho 15; *Bosworth* v. *Anderson;* 47 Idaho 697. The "bond

merely represents the assessment and creates no new lien or obligation." *Balaam* v. *Pacific States Savings & Loan Co.*, 15 Pac. (2d) 186, 187 (Cal. App.). This Court has said as to similar bonds issued by an Idaho municipal corporation: "It is clear that respondent's faith or credit is not pledged and that the value of the bond depends upon the validity and worth of the assessments." *Moore* v. *City of Nampa*, 276 U. S. 536, 540–541. Nor is the lot owner personally liable for the assessment. The assessment must be made from the lots.

The bonds in suit contain recitals, in accordance with the statutes, that the total costs of the improvement have been duly assessed as special assessments against the lots and parcels of land in the respective improvement districts, that the assessments are a lien against the lots and parcels of land, and that the bondholders' remedy in case of nonpayment shall be confined to the enforcement of the assessment (R. 8–9).

In view of the provisions of the statutes and the express terms of the bonds, it would seem impossible to contend that the bonds created any lien or right against the land in petitioner's favor, other than that of the original assessments. These were paid in full.

The attempted reassessments of July 3, 1928, having been made long after the United States acquired title to the land, could create no right or lien as against the United States (*United States* v.

City of Buffalo, 54 F. (2d) 471 (C.C.A. 2d), certiorari denied, 285 U.S. 550; and this seems to be conceded. Petitioner contends, however, that it has been deprived of its remedy of reassessment provided by the Idaho Code (Secs. 49-2726; 49-2821; *infra*, pp. 30, 31), and that this constitutes a taking of its rights. These provisions authorize and direct the city to make reassessments sufficient to pay for the improvement "whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed" by the property owners. There may be some question whether these provisions were available here, since the record shows that the original assessments were equal to the cost of the improvements, but proved inadequate to pay the bonds and interest for other reasons. But passing this question, the right conferred is merely an inchoate one as against the city, to require it to levy reassessments in the event contemplated by the statutes. Until such reassessment is made, there is no right or lien against the lots or land in the bondholders' favor. *Beezley* v. *City of Astoria*, 126 Ore. 177. At the most, the action of the United States in acquiring the land amounted merely to an incidental frustration of such relief or benefit which petitioner might have obtained under the statutes. There was no appropriation of petitioner's rights by the United States, and no implied obligation on the part of the United States can

arise. *Omnia Commercial Co.* v. *United States*, 261 U.S. 502; *Sanguinetti* v. *United States*, 264 U.S. 146.

II

IF THERE WAS A TAKING OF ANY RIGHT OF PETITIONER, THE CIRCUMSTANCES NEGATIVE AN INTENT TO PAY, AND THEREFORE A CONTRACT TO PAY CANNOT BE IMPLIED

In order to confer jurisdiction against the United States on an implied contract, the contract must be one not merely implied in law, on equitable considerations, but one which is implied in fact, founded upon a meeting of minds, which, although not embodied in an express contract, is inferred as a fact from the conduct of the parties showing, in the light of surrounding circumstances, their tacit understanding. *Baltimore & Ohio R.R. Co.* v. *United States*, 261 U.S. 592, 597; *United States* v. *Minnesota Investment Co.*, 271 U.S. 212; *Alabama* v. *United States*, 282 U.S. 502. There was no privity between the United States and petitioner, and no ground upon which a contract between them may be implied *in fact*. The United States paid the lot owners the full value of the lots, and caused all liens existing against them to be satisfied from the purchase price. Under these circumstances it can hardly be implied that the United States agreed in fact to pay some additional amount to the bondholders. The fact that certain sums were withheld from the landowners for a time "for the purpose of protecting the United States" (R. 43) was wholly

consistent with the Government's proceeding under a claim of right.

There is no jurisdiction under the Tucker Act in such circumstances. *Alabama* v. *United States*, 282 U.S. 502; *Ball Engineering Co.* v. *White*, 250 U.S. 46; *Tempel* v. *United States*, 248 U.S. 121; *Hill* v. *United States*, 149 U.S. 593.

III

THE SUIT IS BARRED BY LIMITATION.

The petition alleges a taking of petitioner's "property" by flooding the land on January 1, 1927. (R. 15.) The petition was filed November 25, 1929. (R. 1.) The land was acquired by the United States in various parcels, during the period from 1920 to January 1, 1927. (R. 44–45.) The record does not show the dates of the various contracts or deeds, or show what parcels of land or how many of them were acquired within the six-year period preceding the filing of suit. The "right" or "property" which petitioner claims was taken, was a right, if it existed, to require the city to reassess the amounts due on the bonds of each district, proportionately against each lot of the district on the basis of benefits received, and thereafter to collect such reassessments by foreclosure if necessary. The right was separate and distinct as to each lot, and no lot was liable for the default of any other lot. Such right, if it was taken by the United States, was taken, as to each lot, when the United States ac-

quired title to it, since the lots then became exempt from local taxation, and from liability to reassessment (*United States* v. *City of Buffalo*, 54 F. (2d) 471 (C.C.A. 2d), certiorari denied, 285 U.S. 550). The flooding of the land after the United States had acquired title to it could not affect petitioner's rights in any way. As to some of the land, at least, the suit is barred by the six year limitation of the Tucker Act. Moreover, this limitation is jurisdictional (*Finn* v. *United States*, 123 U.S. 227; *United States* v. *Wardwell*, 172 U.S. 48; *Phillips* v. *Grand Trunk Ry.*, 236 U.S. 662, 667, and since the record fails to show that the cause of action as to any particular lot arose within the six year period, petitioner has failed to meet the requirement that the record must affirmatively establish the existence of the necessary jurisdictional facts. *Parker* v. *Ormsby*, 141 U.S. 81.

IV

THE RIGHT OF ACTION, IF ANY, IS NOT IN THE PETITIONER

It also appears, as to some of the lots at least, that the cause of action, if any, arose before petitioner became the owner of the bonds, and as to such lots, the right of action, if any, is in the prior holder of the bonds.

Petitioner was incorporated in 1925 (R. 34) and acquired the bonds in the same year (R. 36). The lots were acquired by the United States during the period from 1920 to January 1, 1927. (R. 44–45.)

The right to sue, if any, is in the holder of the bonds at the time the United States acquired title to the lots. *Roberts* v. *Northern Pac. R.R.*, 158 U.S. 1. Any implied contract to pay arose at that time, and with the then holder of the bonds. *Carpenter* v. *United States*, 56 F. (2d) 828 (C.C.A. 2d). A cause of action against the United States cannot be assigned. R.S. 3477; *Brothers* v. *United States*, 250 U.S. 88.

CONCLUSION

The judgment of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted.

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OCTOBER 1933.

APPENDIX

IDAHO CODE ANNOTATED, 1932 OFFICIAL EDITION

SECTION 56-602 (I.C.S. § 71-[28]). *Consent to purchases by United States—Jurisdiction for execution of process reserved.*—Consent is given to any purchase already made, or that may hereafter be made, by the government of the United States, of any lots, or tracts of land, within this state, for the use of such government, and to erect thereon and use such buildings, or other improvements, as may be deemed necessary by said government; and over such lands and the buildings, or improvements, that are, or may be, erected thereon, the said government shall have entire control and jurisdiction, except that the state shall have jurisdiction to execute thereon all process, civil or criminal, lawfully issued by the courts of this state, and not incompatible with this cession.

SECTION 49-2702 (I.C.S. § 4000). *Bases of assessments.*—The assessment of the cost and expense or any work or improvement provided for in sections 3942 of Idaho Compiled Statutes and 49-1106 of Idaho Code shall be assessed upon the abutting, contiguous and tributary lots and lands, and lots and lands included in the improvement district formed, each lot and parcel of land being separately assessed for the full debt thereof in proportion to the number of feet of such lands and lots fronting thereon or included in the improvement district, and in proportion to the benefits derived to such property by said improvement sufficient to cover

the total cost and expense of the work to the center of the street.

SECTION 49-2707 (I.C.S. § 4005). *Ordinance creating improvement district.* By the provisions of such ordinance a local improvement district shall be established, to be called "Local improvement district No. ," which shall include all the property fronting or abutting on, contiguous, or tributary to the street to be improved, between the points named in such resolution or ordinance to the distance back from such street, if platted in blocks to the center of the block; if platted in lots to the center of the lots; and if not platted, to the distance of 125 feet.

Such ordinance shall provide that such improvements shall be made and that the cost and expense thereof shall be taxed and assessed upon all property in such local improvement district, which cost shall be assessed in proportion to the number of feet of such lands and lots fronting thereon, or abutting, contiguous or tributary thereto, and included in said improvement district and in proportion to the benefits derived by said improvement: provided, that the city council or trustees may expend from the general fund for such purposes such sums as, in their judgment, may be fair and equitable in consideration of benefits accruing to the general public by reason of such improvement.

SECTION 49-2709 (I.C.S. § 4007). *Lien of assessments—Foreclosure.*—Whenever any expense or cost of work shall have been assessed on any land the amount of said expenses shall become a lien upon said lands, which shall take precedence of all other liens, and which may be foreclosed in accord-

ance with the provisions of the Code of Civil Procedure.

Such suit shall be in the name of the city of ——— (naming it) as plaintiff, and in any such proceedings where the court trying the same shall be satisfied that the work has been done or material furnished, which, according to the true intent of this chapter, would be properly chargeable upon the lots or lands through or by which the street, alley or highway improved or repaired may pass, a recovery shall be permitted, or a charge enforced to the extent of the proper proportion of the value of the work or material which would be chargeable on such lot or land notwithstanding any informalities, irregularities or defects in any of the proceedings of such municipal corporation or any of its officers.

SECTION 49-2710 (I.C.S. § 4008). *Assessment roll.*—Upon the passage of an ordinance as herein provided, or at such later time as the council or board of trustees may determine, the committee on streets, together with the city engineer, or other proper authority of such municipality, shall make out an assessment roll according to the provisions of said ordinance and shall certify the same to the council or trustees of such municipality.

SECTION 49-2711 (I.C.S. § 4009). *Notice of filing roll—Time to file objections.*—Upon receiving the said assessment roll the clerk of the municipality shall give notice by three successive publications in the official newspaper of such municipality that such assessment roll is on file in his office, the date of filing the same, and said notice shall state a time at which the council or trustees will hear and consider objections to said assessment roll by the

parties aggrieved by such assessments. The owner or owners of any property which is assessed in such assessment roll, whether named or not in such roll, may, within ten days from the last publication provided herein, file with the clerk his objections, in writing, to said assessment.

SECTION 49-2712 (I.C.S. § 4010). *Hearing objections—Order thereon.*—At the time appointed for hearing objections to such assessment, the council or trustees shall hear and determine all objections which have been filed by any party interested to the regularity of the proceedings in making such assessment, and the correctness of such assessment, or of the amount levied on any particular lot or parcel of land, and the council or trustees shall have the power to adjourn such hearing from time to time and shall have power, in their discretion, to revise, correct, confirm or set aside such assessment and to order that such assessment be made de novo and such council or trustees shall pass an order approving and confirming such assessment as corrected by them, and their decision and order shall be a final determination of the regularity, validity and correctness of said assessment to the amount thereof levied on each lot and parcel of land.

SECTION 49-2713 (I.C.S. § 4011). *Appeal from order.*—Any person who has filed objections to such assessment or reassessment as hereinbefore provided shall have the right to appeal to the district court of the state and county in which said municipality may be situated.

Such appeal shall be taken by filing a written notice of appeal with the clerk of such municipality within 10 days after such assessment or reas-

sessment roll shall have been approved and confirmed by the council or trustees, and said notice shall describe the property and the objections of such appellant to such assessment, and such appellant shall also file with the clerk of the district court aforesaid, within 20 days from the approval and confirmation of such roll by the council or trustees, a copy of said notice of appeal, assessment or reassessment roll and proceedings thereof, certified by the clerk of such municipality, together with a bond to such municipality, conditioned to pay all costs that may be awarded against the appellant in such sum not less than $200 and with such security as shall be approved by the judge of said court.

SECTION 49-2714 (I.C.S. § 4012). *Trial of appeal.*—The case shall be docketed by the clerk of said court in the name of the person taking the appeal against the municipality as "An appeal from assessments." Said cause shall then be at issue and have precedence over all civil cases pending in said court, except proceedings under the act relating to eminent domain by cities and villages, actions of forcible entry and detainer. Such appeal shall be tried in said court as in the case of equitable causes, except that no pleadings shall be necessary. The judgment of the court shall be either to confirm, modify or annul the assessment in so far as the same affects the property of the appellant, from which judgment an appeal shall lie to the Supreme Court, as in other causes. In case the assessment is confirmed, the fees of the clerk of the municipality for copies of the record shall be taxed against the appellant with other costs.

SECTION 49-2715 (I.C.S. § 4013). *Special assessments for improvements—Collection.*—All such assessments shall be known as special assessments for improvements and shall be levied and collected as a separate tax, in addition to the taxes for general revenue purposes, to be placed on the tax roll for collection, subject to the same penalties and collected in the same manner as other municipal taxes.

SECTION 49-2716 (I.C.S. § 4014). *Bonds—Issuance to cover instalment payments.*—Whenever the mayor and council or trustees of any municipality shall, under authority vested in them by any laws of this state, cause any street or avenue, or alley in such municipality, to be sidewalked, graded, curbed, planked, graveled, paved, guttered, sprinkled, lighted, repaired, or macadamized, or any other local street improvements, provided for in section 3942 of Idaho Compiled Statutes and 49-1106 of Idaho Code, the cost and expense of which is chargeable to the abutting, adjoining, contiguous or approximate property, they may, in their discretion, provide for the payment of the costs and expenses thereof by instalments instead of levying the entire tax of special assessments for such costs at one time, and for such instalments they may issue, in the name of the municipality, improvement bonds of the district, which shall include the adjoining, contiguous, and approximate property liable to assessment for such local improvements payable in instalments of equal amount each year, which bonds shall, by their terms, be made payable on or before a date not to exceed ten years from and after the date of issue of such bonds, and shall bear interest not ex-

exceeding seven per cent per annum, number of years for said bonds to run and the rate of interest thereon, within said limits, in each instance to be determined by the city council or village trustees: provided, however, that when such bonds are issued for further, separate or additional improvement by paving street or streets, or highways that have theretofore been graded, curbed or graveled only, under the provisions of this chapter, then such bonds shall be a subsequent lien upon the property subject to assessment for such improvement, to the lien of the unpaid, unliquidated, and unredeemed outstanding bonds, theretofore issued for the original improvement of grading, curbing, or graveling of such street or streets or highway: provided further, that the grading, curbing or graveling of street, streets, or highways, only and thereafter the paving of said street, streets or highways as shall have theretofore been graded, curbed, or graveled, as allowed and contemplated by provisions of this chapter, shall not be construed or understood as one of the same improvement, or for the same purpose or for one or the same benefit, or as a double assessment for improvements against the property to be assessed for the payment of the costs and expenses of such improvement, but shall be considered and construed as separate, distinct, single and independent improvements and benefits, to such street, streets, or highways and the property assessed for the payment of the costs and expenses thereof. And all assessments levied or bonds issued for the payment of either or each of such improvements, shall be considered and construed as assessments levied or bonds issued for separate, distinct, single, and

independent improvements and benefits on and to such street, or streets, or highways, and the property assessed for the costs and expenses of such improvement.

SECTION 49 2717 (I.C.S. § 4015). *Disposal of bonds. Interim warrants.* Such bonds may be issued to the contractor constructing the improvement in payment thereof, or the mayor or council or trustees or other authorized officers of said municipality may sell the same at not less than their par value net, and pay the proceeds thereof to the contractor. If the council or trustees shall determine to issue and sell said bonds, they may, for the purpose of meeting the expense of making said improvements as the same are installed prior to the sale of said bonds, issue warrants against the improvement district, payable to the contractor or other proper person, upon estimates of the city or village engineer, bearing interest at the rate of not to exceed 7 per cent per annum, which warrants, together with the interest due thereon at the date of the issuance of said bonds, shall be redeemed and retired by the proceeds of the sale of said bonds.

SECTION 49 2718 (I.C.S. § 4016). *Maximum bond issue. Interest coupons.* Such bonds shall not be issued in excess of the contract price and expense of such improvement, including engineering and other clerical service, advertising, cost of inspection, cost of collecting assessments, and interest upon warrants, if issued as aforesaid, and the instalment coupons shall include annual interest on such instalments to the maturity thereof. The bonds shall be of such denomination as the council or trustees shall deem proper.

SECTION 49-2720 (I.C.S. § 4018). *Form of bonds.*—Such bonds shall be numbered from one upward, consecutively, and each bond and coupon shall be signed by the mayor, or the chairman of the board of trustees, countersigned by the city or village treasurer, and attested by the clerk of such municipality: provided, however, that such coupons may, in lieu of being signed have printed thereon the facsimile of the signature of said officers, and each bond shall have the seal of such municipality affixed thereto, and shall refer to the improvement district for the payment of which the same shall be issued. Each bond shall provide that the principal sum therein named and the interest thereon shall be payable out of the local improvement fund created for the payment of the cost and expense of such improvement and not otherwise.

SECTION 49-2721 (I.C.S. § 4019). *Payment of instalments by owner.*—The owner of any piece of property liable for any special assessments may redeem his property from such liability by paying the entire assessment chargeable against his property, upon the municipal clerk having published a printed notice in the official newspaper of the municipality for 10 consecutive days, or three consecutive weekly issues, which notice shall state the time for payment to begin and the time for payment to close, the last day of said notice to be not less than 30 days before the issuance of the bonds, or, after the issuance of the bonds, by paying all the instalments of the assessments which have been levied and also the amount of the unlevied instalments with interest on the latter at the rate provided in the bonds from the date of the issuance of the bonds to the time of the maturity of the last

instalment. In all cases where instalments of the assessments are not yet levied and paid as above provided, whether before or after the issuance of the bonds, the same shall be paid to the clerk, who shall receipt therefor, and all sums so paid shall be applied solely to the payment of the cost and expense of such improvements or the redemption of the bonds issued therefor.

When any piece of property has been redeemed from liability for the costs of any improvements herein provided, such property shall not thereafter be liable for further special assessments for the cost of such improvements except as hereinafter provided.

SECTION 49-2725 (I.C.S. § 4023). *Bondholders' rights and remedies.*—Said bonds, when issued to the contractor constructing the improvements in payment thereof, or when sold as above provided, shall transfer to the contractor, or other owner or holder, all the right and interest of such municipality in and with respect to every such assessment, and the lien thereby created against the property of such owners assessed as shall have not availed themselves of the provisions of this chapter in regard to the redemption of their property as aforesaid, shall authorize said contractor and his assigns, and the owners and holders of said bonds to receive, sue for and collect, or have collected such assessment embraced in any such bond or through any of the methods provided by law for the collection of assessments for local improvements.

And if the municipality shall fail, neglect or refuse to pay said bonds, or to promptly collect any of such assessments when due, the owner of any such bonds may proceed in his own name to

collect such assessments and foreclose any lien thereon in any court of competent jurisdiction, and shall recover, in addition to the amount of such bonds and interest thereon, five per cent, together with costs of such suit including a reasonable sum for attorney's fees.

Any number of the holders of such bonds for any single improvement may join as plaintiff, and any number of holders of the property on which the same are a lien may be joined as defendants in such suit.

And such bonds shall be equal liens upon the property for the assessments represented by such bonds without priority of one over another to the extent of the several assessments against the several lots and parcels of land.

SECTION 49-2726 (I.C.S. § 4024). *Reassessment of benefits.* In all cases of special assessments for local improvements of any kind against any property, persons or corporations whatsoever, wherein said assessments have failed to be valid in whole or in part for want of form or sufficiency, informality, irregularity or nonconformance with the charter provisions or laws governing such assessments, the city council or trustees or other authorized board or body shall be, and they are hereby, authorized to reassess such special taxes or assessments and to enforce their collection, in accordance with the provisions of law existing at the time the reassessment is made.

Whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed by owners of property in the local assessment district where the same is made, it shall be lawful,

and the city council or trustees or other authorized board or body is hereby directed and authorized to make reassessments on all the property in said local assessment district sufficient to pay for such improvement, such reassessment to be made and collected in accordance with the provisions of the law or ordinance existing at the time of its levy.

SECTION 49-2727 (I.C.S. § 4025): *Application of bonding provisions.*—Nothing shall be construed as repealing or modifying any existing manner and method for cities of the first class, or those organized under special or local laws, to make improvements as hereinbefore provided for, but shall be construed as an additional and concurrent power and authority. Any city whose charter provides for the issuance of bonds for local improvements, payable only from the proceeds of special assessments, is hereby authorized to issue such bonds in the manner and with the effect provided in this chapter, and the holder of any such bond shall look only to the fund provided by such assessment for the principal or interest of such bond.

SECTIONS 49-2801 to 49-2831 (I.C.S. §§ 4121–4151) relate to sewer improvements and are to similar effect as the sections set out above.

SECTION 49-2821 (I.C.S. § 4141) provides for reassessments as to sewerage improvements, and is as follows:

> In all cases of special assessments in local sewerage improvements or sewerage disposal works of any kind against any property, person or corporation whatsoever, where any such assessments have failed to be valid in whole or in part for want of form, or of sufficient informality or irregu-

larity, or nonconformance with the charter, ordinances or provisions of law governing such assessments, the city council or trustees, or other authorized bodies or board shall be, and they are hereby authorized to reassess such special taxes or assessments and to enforce their collection in accordance with the provisions of law existing at the time the reassessment was made.

Whenever, for any cause, mistake or inadvertence, the amount assessed shall not be sufficient to pay the costs of sewerage improvement made and enjoined on the property, or on the owners of property in the local assessment district where the same is made, it shall be lawful and the city council or trustees or other authorized body or board is hereby directed and authorized to make reassessment upon all the property in said local assessment district to pay for such improvements, such reassessment to be made and collected in accordance with the provisions of law or ordinances existing at the time of the levy.

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